GOLDEN STAR VIDEO & MUSIC CENTRE & ANOR.

v.

DAILY VIDEO SDN. BHD.

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CIVIL APPEAL NO. T-(12) 2 OF 1994]
18 JULY 1994

CONTRACT: Claim for amount outstanding under a dealership agreement - Agreement providing for payment of licence fees - Total amount payable divided into 11 instalments - Whether defendants contention that licence fees were payable monthly acceptable - Whether plaintiff had been overpaid.

The defendants/appellants appealed against the decision of the lower Court which gave judgment to the plaintiff/respondent in an action for the recovery of the amounts outstanding under a dealership agreement between the first appellant and the respondent. The second appellant was the guarantor for the first appellant.

The dealership agreement *inter alia* provided for the payment of the licence fees of RM225,000 which payment was to be paid by 11 instalments. The first appellant breached the terms of the agreement and the respondent terminated the agreement and sued for the amount due under the agreement.

The appellants contended that the agreement governing the payment of the licence fees should be construed to mean that a monthly licence fee of RM11,842.10 per month was payable and as the respondents had terminated the agreement after 13 months, the licence fee together with the other debts only amounted to a sum of RM171,548.55. The appellants argued that as the total payments made to the respondents amounted to RM195,862.10, there was an overpayment of RM21,310.55 and they counterclaimed for this sum.

Held:

[1] The language used in the agreement is clear and admits of no ambiguity. It spells out in no uncertain terms the date on which each payment is to be made. The parties have agreed that the total amount of the licence fee should be paid by instalments by a certain date and this has the effect of making every instalment falling due and unpaid becoming a debt due from the first appellant to the respondent.

[2] It follows from the applellants argument that though it was the fault of the first appellant that resulted in the early determination of the agreement, the agreement can nevertheless be construed to allow the first appellant to take advantage of his own wrong in bringing the agreement to an end and thus reduce his liability to pay the licence fee. This manner of construction is against the rule of construction which presumes that (in the absence of clear, express provisions to the contrary, and there is none in this case) a contracting party is not permitted to take advantage of his own wrong as against the other party.

[3] Though the learned Sessions Judge was wrong in admitting and considering the oral evidence in support of the existence of a collateral agreement, the learned Judge was not wrong in coming to the conclusion that the oral evidence led did not support the alleged collateral agreement, especially in the light of the documents emanating from the appellants or executed by them admitting the debt.

[Appeal dismissed with costs to be taxed].

Sources referred to:
Chitty on Contracts, 26th Edn., Vol. 1, para 1775

For the appellants - Edwin Tsen; M/s. Tan Pang Tsen & Co.
For the respondent - Ting E. Hang; M/s. Ting & Co.

JUDGMENT

Ian H.C. Chin J:

The undisputed facts and documents relating to this case are as follows. On 18 June 1989 Golden Star Video & Music Centre (the 1st Appellant") entered into a dealership agreement ("the agreement") with Daily Video Sdn Bhd ("the Respondent") whereby the 1st appellant acquired the non-exclusive licence from the respondent to rent to the public for domestic viewing certain television programmes and movies that were recorded on cassette tapes. The licence was to commence from 1 June 1989 until 31 December 1990 and the licence fee payable was to be the sum of RM225,000 and was to be paid in the following manner:

Schedule II

Licence Fee And Mode Of Payment

(A) Licence Period: From 1 June 1989 to 31 December 1990.
(B) Licence Fee: RM225,000.00
(C) Mode of Payment: Payment shall be made as follows:

1. RM50,000 upon signing of this agreement
2. RM17,500 on 15 June 1989
3. RM17,500 on 30 July 1989
4. RM17,500 on 15 September 1989
5. RM17,500 on 30 October 1989
6. RM17,500 on 15 December 1989
7. RM17,500 on 30 January 1990
8. RM17,500 on 15 March 1990
9. RM17,500 on 30 April 1990
10. RM17,500 on 15 June 1990.
11. RM17,500 on 30 July 1990

Post-dated cheques shall be made in favour of [the Respondent] for all immatured payments and all such cheques are to be deposited with the licensor upon signing of this agreement. Default payment on any cheque will render the supply of TVB programmes being stopped until the relevant payment is settled. This agreement will be terminated if before the settlement of the first bounced cheque, the cheque for the following payment bounces too and all prepaid amount shall be forfeited.

Other relevant provisions of the agreement are:

4. *Licence Fee And Payment*

... the parties hereto agree that time shall be of essence where payments such as the present relating to the grant of this non-exclusive licence are concerned. In the event of earlier determination of this licence due to any of the events set out in clause 10 hereafter appearing all prepaid amounts will be non-refundable and shall be forfeited.

10. *Material Breach And Termination*

The parties agree that the happening of the following events shall constitute a material breach of this agreement and violates the essence of the [1st Appellant's] obligations and without prejudice to any of [the Respondent's] other rights or remedies at law or in equity [the Respondent] at their election may terminate this agreement upon the happening of any of the following events:

(i) [the 1st appellant] shall be in breach and have not duly observed any of the undertakings, terms and or conditions herein contained or obligations on its part assumed.

(ii) [the 1st Appellant] shall fail to account and omit payments at the appropriate time stated.

(iii) [the 1st Appellant] shall be adjudicated a bankrupt or become insolvent or a receiver whether permanent or temporary for all of or substantially all of [the 1st Appellant's] property shall be appointed by any Court or if [the 1st Appellant] shall make a general assignment for its creditors' benefit or any voluntary or involuntary petition under any bankruptcy or winding up laws shall be filed with respect to [the 1st Appellant].

(iv) the majority of the management or control of [the 1st Appellant] passes to another or other persons, firms, or corporations than those who exercise such management or control on the date of the execution of this agreement.

11. *Effect Of Waiver*

No waivers by [the Respondent] of any breach or series of breaches of this licence shall constitute a waiver of any subsequent breach or waiver of the terms of this licence and shall not affect [the Respondent's] right to the enforcement of the other terms and conditions.

The performance of the agreement by the 1st appellant was guaranteed by Lim Tong Shing ("the 2nd Appellant"). The 1st appellant defaulted in making the payments due under the agreement and this culminated in a letter from the solicitors of the respondent to the 1st appellant in the following terms:

23 March 1990

Notice of Termination

We act for Daily Video Sdn Bhd and refer to the licence agreement dated 12 June 1989 entered into between yourselves and our clients.

We are instructed that you have committed a material breach of the said agreement in that you have failed to settle the licence and recording fees despite repeated requests to do so. The amount outstanding is as follows:

Balance as at 31 January 1990	RM57,942.02
Less: Payments	RM 5,000.00
	RM52,942.02
Add: Recording fees and "B" cards	RM 1,526.00
Licence fee due on 15 March 1990	RM17,500.00
	RM71,968.02

Pursuant to clause 10 of the said agreement, we hereby on behalf of our clients terminate the said agreement forthwith. You are no longer authorised to deal in licensed programmes.

Pursuant to clause 3(f) of the said agreement you are required forthwith to withdraw from

rental all video cassettes of the licenced programmes and surrender them to our clients for erasure. If you fail to return or surrender the said video cassettes you are liable to pay our clients the sum of RM500 or such other sum as may be proved against GSVSB by the producers of the licenced programmes as liquidated damages for every video cassettes not surrendered.

Please note that the termination of this agreement is without prejudice to our clients' rights to recover the abovementioned outstanding licence and recording fees from you or such other sums as may be due hereafter.

The 1st appellant obtained a reprieve through a meeting had between the parties and the position was stated in the following letter from the respondent to the 1st appellant, *viz:*

6 April 1990

In consideration of your making a part payment of RM20,000 (our receipt No. 1830) and your agreeing to pay the other balance of the overdue amount by four instalments, we agree therefore to withdraw our said termination notice. As promised by you, please ensure to make timely payment in accordance with our agreed payment schedule.

In the event of any subsequent default on any overdue payment, we shall not hesitate to terminate the agreement forwith without prejudice to any of our other rights or remedies at law.

The 1st appellant apparently again defaulted in its promise of payment and this resulted in a letter from the solicitors of the respondent to the 1st appellant in the following terms:

22 October 1990

We are instructed to and do hereby on behalf of our clients give you notice that our clients have terminated the said agreement with you with immediate effect without prejudice to our clients' right against you for payment of the unpaid licence fee or in respect of the breach.

We are also instructed to and do hereby request you to surrender to our clients or to us as solicitors for our clients all the video cassettes of the programmes recorded for you by our clients pursuant to the said agreement. Unless you do so immediately and within 2 days from the date hereof, legal action will be taken against you without further reference to you.

We are also instructed to demand that you pay up the unpaid licence fee of RM82,164.29 within 7 days from the date hereof. In default thereof legal action will be taken to recover payment from you together with interest and costs without further notice.

A demand was also made on the 2nd appellant as guarantor to pay up the sum demanded of the 1st appellant. The respondent thereafter on 6 November 1990 took out a writ in the High Court, intituled as Suit No. T57 of 1990, against both appellants and claimed a sum of RM82,164.29 and various injunctions. A representative of the respondent and the 2nd appellant, who incidentally was the sole proprietor of the the 1st appellant firm, met and the following letter dated 12 November 1990, from the 1st appellant to the respondent, ensued. *viz:*

12 November 1990

Daily Video Sdn Bhd,

Dear Sirs,

Suit No 157 of 1990
Daily Video Sdn Bhd
v.
1. Golden Star Video & Music Centre
(sued as a firm)
2. Lim Tong Shing (I/C No. H0086873)

We refer to the above and propose an out of court settlement of the above case with you as follows:

(a) Immediately upon acceptance of this proposal by you:

(1) To deliver to you 5,170 (five thousand one hundred and seventy pieces of used video cassette tapes in good condition at the price of RM3.30 (Ringgit fifteen Thousand five hundred and ten only)

(2) To deliver to you 15 (fifteen) units of video Cassettle (sic) Recorder in good running condition at RM500 (Ringgit Five Hundred only) per unit, totalling RM7,500 (Malaysian Ringgit Seven thousand five hundred only.)

(b) Within 7 (seven) days of acceptance of this proposel *(sic)* by you, we shall erase all video cassettes remaining in our possession containing programmes produced by the Television Broadcasts Limited of Hongkong except for any tapes not returned to us which we shall erase within 24 hours of their return to us and in default thereof, we shall be liable to

you at RM500 per tape which may be found to remain in our possession containing programmes produced by the Television Broadcasts Limited of Hong Kong.

(c) Within 6 (Six) months from the date of your acceptance of our offer, to pay to you another RM20,470 either in cash or by used video cassette tapes in condition also at RM3 per tape.

(d) Your agreement that if we duly honour the proposals under para (a), (b) and (c) above, you will give us rebate of RM38,684.29 in respect of the licence fee payable under Dealer Licence Agreement with you dated 12 June 1989 by writing off the said unpaid balance of the licence fee.

If you accept our above proposal, you shall withhold further legal action against us and the guarantor Mr Lim Tong Shing immediately upon receipt of the items under para. (a) above. However if we failed to honour para. (b) or (c) above, you may forthwith continue legal action against us to recover the balance of the licence fee and to exercise your rights under the aforesaid Dealer Licence Agreement and seek such remedies as you may think either in law or in equity as if you have never agreed to the above proposal giving credit only for the goods at the above agreed prices which you have actually received and we shall not be entitled to use this agreement as a defence against your above suit.

Please confirm your acceptance of the above by signing and returning a copy of this letter to us and at the same time send your representative to collect from us items under para (a) and (b) above.

Yours faithfully,

[Signed by Lim Tong Shing as manager of 1st appellant]

[Signed on behalf of respondent accepting proposal.]

The 1st appellant again defaulted in payment and this time it resulted in the letter of 27 April 1991 from the respondent to the 1st appellant, *viz:*

Re: Unpaid Licence Fees
Suit No. T 547 Of 1990

May we remind you that in accordance with the agreement dated 12 November 1990 the following sum of RM18,634 is still unpaid to-date:

a	Licence fee overdue as at 12 November 1990	- RM82,164.29
	Less: Contra of goods received 12 November 1990 -	23,646.00
	Contra of goods received 13 March 1991 -	1,200.00
b		57,318.29
	To: Rebate if full payment received by 12 May 1991 -	38,684.29
	Balance now overdue	18,634.00

c We have to advise you that should you fail to settle this amount of RM18,634 on or before 12 May 1991, the proposed rebate of RM38,684.29 shall immediately be forfeited. Further, we shall have to exercise our rights under the Dealer Licence Agreement as we think fit, and to place this matter in the hands of our solicitors to pursue further legal actions.

d In your own interest, we therefore urge that you arrange immediate payment to us upon receipt of this letter.

The 1st appellant responded by a letter dated 6 May 1991 and stated that the amount owing should only be RM15,462.67 and not RM18,634 *e* and the 1st appellant asked for three months grace to pay the money. The request for the grace period was apparently not acceded to because the respondent, through its solicitors, wrote to the 1st appellant on 20 May 1991 in the following terms (the relevant part):

f Outstanding Licence Fee due to
Daily Video Sdn Bhd
RM54,147.29

We refer to the above and your letter dated 12 November 1991 to our clients proposing to make full settlement within 6 months from that date and that our clients would give you a *g* rebate of RM3,684.29 if you pay within the time set out in that letter.

We are instructed that you have failed to pay as agreed in that you have failed to pay RM15,463 on or before 12 May 1991. By which default, you are no longer entitled to the rebate of RM38,684.29.

h We are instructed to and do hereby on behalf of our clients demand that you pay the balance of the licence fee of RM54,147.29 into our office within 10 days from the date of this letter for our transmission to our clients. Please take notice that in default of payment by you, court action will immediately thereafter be proceeded *i* against you to recover full payment together with interest and costs of the Court action

without further reference to you. Action will also be proceeded against you even if this letter somehow does not reach you.

This was followed by another letter from the respondent's solicitors to the 1st appellant dated 10 July 1991 to remedy an error in the immediate previous letter and it reads:

Outstanding Licence Fee due to
Daily Video Sdn Bhd:
RM51,152.29 as at 25 May 1991

We refer to the above and your letter dated 12 November 1990 to our clients proposing to pay RM43,480 to our clients within 6 months and our clients would write off the balance of RM38,684.29 as a rebate if you do pay as promised.

2. We are instructed that you have failed to pay as promised in that you paid on (sic) RM28,017 by 12 June 1991. You paid another RM2,995 by way of contra of account for video tapes sold to our clients on 15 May 1991. By which default, you are no longer entitled to the rebate of RM38,684.29 or any part thereof.

3. We are instructed to and do hereby on behalf of our clients demand that you pay the balance of the licence fee of RM51,152.29 into our office within 10 days from the date hereof for our transmission to our clients. Please take notice that in default of payment by you, Court action will be commenced against you immediately to recover full payment together with interest and costs without further reference to you.

4. By this letter, our letter dated 20 May 1991 is deemed withdrawn as it has not taken into account the sum of RM2,995 paid by contra of account on 15 May 1991.

Demands were made on the 2nd appellant to pay as guarantor. It was upon the undisputed facts which I have just set out that the learned Sessions Court Judge was asked to make various decisions, the issues of which were supposed to have been defined by the pleadings. I will now set out the relevant part of the amended statement of claim, *viz:*

6. As a result of the [1st Appellant's] failure to pay the licensing fees in accordance with the licensing agreement, the [Respondent] by their solicitors' letter dated 22 October 1990 terminated the licensing agreement.

7. At the time of the termination of the licensing agreement, the [1st Appellant] owed the [Respondent] RM82,164.29 in respect of the licensing fees.

8. By an agreement reached through a letter dated 12 November 1990, it was agreed that the [Respondent] would give the [1st Appellant] a rebate of RM38,684.29 on the licensing fees if the [1st Appellant] by 12 May 1991. The [Appellants] paid only RM28,107 by that date by way of agreed contra of accounts against costs of goods sold to the [Respondent]. A further sum of RM2,995 was paid (also by contra of account) on 15 May 1991.

Particulars

Licensing Fee owing on 12.11.90		RM82,164.29
Contra against goods received on 12.11.90	RM23,646.00	
Contra against goods received on 8.12.90	838.00	
Contra against goods received on 13.3.91	1,200.00	
Contra against accounts being $^1/_3$ share from sale of business of Lian Fatt	2,333.00	28,017.00
		54,147.25
Less contra for goods received on 15.5.91		2,995.00
		RM51,152.25

10. Despite requests and demand, the [1st Appellant] have failed or otherwise neglected to pay the balance of the licensing fee of RM51,152.29.

11. By a document called "Individual Guarantee" dated 16 May 1989 (hereinafter called "the Guarantee"), the [2nd Appellant] guaranteed the due performance by the [1st Appellant] of the Licensing Agreement ...

12. Separate original letter of demand ... served ...

13. Both ... failed ... to pay ... RM51,152.25 ...

14. It is provided under the licensing agreement that the [1st Appellant] ... pay all costs including legal fees incurred by the plaintiff ...

15 ...

16 ... [Respondent] have incurred or suffered legal costs of RM5,100.00 ... and more if this suit is contested.

And the [Respondent] claim against the [Appellants] jointly and severally -

(1) the said sum of RM51,152.25;
(2) interest ... at 8% per annum from date hereof to date of judgment or at such other rate as the Court may direct under s. 11 of the Civil Law Act 1956;
(3) statutory interest ...;
(4) Court fee RM100.00;
(5) solicitors fee RM5,100.00 or to be taxed if this suit is contested.

Dated 29 July 1991.

The appellants filed their defence and counterclaim The relevant part of their pleading reads:

> 2. Paragraph 6 of the statement of claim is denied. The [Appellants] aver that the [Respondent] had already terminated the said licensing agreement on or about 28 June 1990 when they failed to supply recorded programmes to the [1st Appellant] and as such the [1st Appellant] could no longer carry on any renting of the programmed to be supplied by the [Respondent].
>
> 3. Paragraph 7 of the statement of claim is denied. The [Appellants] aver that the licence fee for the licence period from 1 June 1989 to 31 December 1990, of 19 months is RM225,000 or RM11,842.10 per month ... the [Respondent] are only entitled to collect licence fees to the sum of RM153,947.30 for the 13 months while the [Respondent] supplied recorded programmes to them and as such the [Respondent] are not entitled to any further payment ... as from 1 July 1990.
>
> 4 The [Appellants] aver that they have over paid to the [Respondent] the sum of RM21,310.55 under a mistake of fact and of the law...
>
> *Particulars*
>
> | | |
> |---|---|
> | Amount paid by the [1st Appellant to the [Respondent] | RM195,862.10 |
> | Less: Amount due to the [Respondent] (for 1989 to 1990) | RM164,676.86 |
> | Less: Amount due to the [Respondent] (for 1988 to 1989) | RM 9,874.69 |
> | | RM 21,310.55 |
>
> 5. Paragraph 8 of the statement of claim is denied. The [Appellants] aver that the said letter was prepared by M/s Ting & Co ... and was compelled to signed (sic) the said letter under threat of legal action and is therefore void under ss. 15,16 and 19 of the Contracts Act 1950. Further ... the said letter was signed under a mistake of fact and therefore void under s. 21 of the Contracts Act 1950.
>
> 6, 7, 8 ...
>
> Counterclaim

The [Respondent] replied in the following terms:

> 1. Save and in so far as the same consists of admissions the [Respondent] join issue with the [Appellants] upon their defence.
>
> 2. The [Respondent] deny paragraph 2 of the statement of defence. The [Respondent] say that it is the duty of the [Appellants] under the licensing agreement to provide blank video cassettes for duplicating the licensed programmes and to pay a recording fee of RM10 per tape. If the [Respondent] failed to supply recorded programmes on or about 28 June 1990 as alleged (which is denied), it was because the [Appellants] did not provide the blank video cassettes and/or did not agree to pay the recording fee of the licence fee. Recording fee of RM816.10 was outstanding on 28 June 1990. Licence fee of RM74,848.19 was owing on that date.
>
> 3. Further, the [Respondent] say that conduct of the [Appellants] subsequent to 28 June 1990 also showed that they regarded the licensing agreement as still subsisting until it was terminated on 22 October 1990.
>
> 4. The [Respondent] also deny paragraph 3 and 4 of the statement of defence. The licensing agreement specifically sets out a time table for paying the licence fees by 11 instalments, the first of which was for RM50,000 and the other 10 are for RM17,500 each ... with the last instalment on 30 July 1990. It is erroneous and contrary to the provision of the licensing agreement for the defendants to divide the total licence fee into 19 equal monthly instalments and claim to the effect that they are repayable over 19 months. It is also expressly provided under the licensing agreement that in the event of earlier determination of the licence, all prepaid amounts will be non-refundable and shall be forfeited. The [Respondent] will rely on the relevant provisions of the licensing agreement for their full terms and effect.
>
> 5. The [Respondent] also deny paragraph 5 of the statement of defence. The [Respondent] aver that at no time were the defendants compelled, coerced or unduly influenced by either Ting & Co. or the [Respondent] into signing the letter dated 12 November 1990 which was typed out by the [Appellants] themselves on the [1st Appellant's] own letter head and signed, presumably, in the [Appellants'] own office in the absence of anyone from Ting & Co.

The oral evidence in this case is of no consequence and I will not set them out because they cannot be relied on by the defence as setting up a collateral agreement for the purpose of contradicting almost all the terms of the agreement and also because a collateral agreement is not pleaded in the defence; therefore, the learned Sessions Judge should have upheld the objection to the admission of such evidence by Mr. Ting E. Hang, Counsel for the respondent. I have first to determine what the respondent's claim is and I am of the view that the respondent's

claim is for a debt due under the agreement which is, as pleaded in para. 10 of the statement of claim (supra), the balance of the licensing fee of RM51,152.25 due under the agreement. The law concerning such a claim is stated in **Chitty on Contracts,** 26th Edn, Vol. 1, at para 1775, thus:

> There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such a debt (it is also possible that, in addition to a claim for a debt, there may be a claim for damages in respect of consequential loss caused by the failure to pay such a debt at the due date.) The relevance of this distinction is that rules on damages do not apply to a claim for a debt, e.g. the plaintiff who claims payment of a debt need not prove anything more than his performance or the occurrence of the event or condition; there is no need for him to prove any actual loss suffered by him as a result of the defendant's failure to pay; the whole concept of the remoteness of damage is therefore irrelevant; the law on penalties does not apply to the agreed sum; the plaintiff's duty to mitigate his loss does not generally apply; and the plaintiff will usually be able to seek summary judgment. The distinction may also be irrelevant where a contract provides for payment to be made by instalments; thus, under a hire-purchase agreement, a claim for arrears of instalments already due is a claim in debt quite distinct from a claim for damages for breach of the contract as a whole. Under a contract for payment for instalments, no claim in respect of instalments due in the future may be brought as a claim for a debt, but if the party due to pay the instalments has committed a breach of his obligations which entitles the other party to terminate the contract, then, subject to the general rules on damages, an award of damages may be made in respect of the prospective loss of the future instalments, allowance being made for a discount on account of the earlier payment of a lump sum to be received under the judgment instead of the instalments spread over the future period.

Though it was an issue whether the agreement was terminated on 28 June 1990 or 22 October 1990, it does not now matter because the respondent did not cross-appeal against the finding of the learned Sessions Judge that the agreement was terminated on 28 June 1990. Therefore, for the purposes of this appeal, the date of termination of the agreement is 28 June 1990 This means the instalment of RM17,500 payable on 30 July 1990 was not due for payment when the agreement was terminated on 28 June 1990. It is thus, that the learned Sessions Judge disallowed the respondent's claim for the said sum of RM17,500 and he only awarded the respondent a sum of RM33,651.95 instead of the sum of RM51,151.95 claimed.

Mr Edwin Tsen argued that the agreement governing the payment of the licence fee should be construed to mean that a monthly licence fee of RM11,842.10 per month was payable and that since the agreement was terminated on 28 June 1990, the respondent had been overpaid. The total licence fee payable for the 19-month licence was RM225,000. Mr Edwin Tsen argued that for the 13 months before the termination of the agreement, the licence fee payable should be, 13 months x RM11,842.10, RM153,947.30 which together with other debts came up to RM171,548.55. Since the appellants had by then paid RM195,862.10 there was, argued Mr. Edwin Tsen, an over-payment of RM21,310.55 for which the appellants counterclaim. I do not see how such an argument can be sustained. In the first place the language used in the agreement is clear and admits of no ambiguity. It spells out in no uncertain term the date in which each payment is to be made. Every amount payable on the due date and not paid became a debt. It may very well be that the licence was, when divided by a period of validity of 19 months, was worth RM11,842.10 per month but, the parties have agreed that the total amount of the licence fee should be paid by instalments by a certain date. This has the result, as I said earlier, of making every instalment falling due and unpaid becoming a debt due from the 1st appellant to the respondent. It is upon a debt, as I have also earlier said, that the respondent had sued the 1st appellant. It follows from Mr. Edwin Tsen's argument that though it was the fault of the 1st appellant that resulted in the early determination of the agreement, the agreement can nevertheless be construed to allow the 1st appellant to take advantage of his own wrong in bringing the agreement to end and thus reduce his liability to pay the licence fee from that of RM225,000, if the agreement had not been terminated, to that of RM153,947.30. This manner of construction of the agreement

urged by Mr. Edwin Tsen is against the rule of construction which presumes that (in the absence of clear, express provisions to the contrary, and there is none in our case) a contracting party is not permitted to take advantage of his own wrong as against the other party. See **Chity on Contracts,** 26th Edn, Vol. 1, at para 1681.

I should add that though the learned Sessions Judge was wrong in admitting and considering the oral evidence which, Mr. Edwin Tsen argued, went to support the existence of the collateral agreement whereby the agreement in question was not to be sued on, meaning, the debt was not to be a debt, I cannot say that the learned Sessions Judge was wrong in coming to the conclusion that the oral evidence led in this case does not support the alleged collateral agreement, especially in the light of the indisputable evidence that I have set out, *supra;* especially the documents emanating from the appellants or executed by them admitting the debt.

I therefore dismiss the appeal with costs to be taxed.

HARUN BIN YAAKOB & 66 ORS.

v.

AHEAD DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 23-97-93]
12 JUNE 1994

PRACTICE & PROCEDURE: Further arguments - Application to strike out plaintiffs' claim - Single claim made by plaintiffs in respect of individual sale and purchase agreements - Contention that plaintiffs should not have filed single writ as plaintiffs have separate causes of action - Defendant seeking to strike out claim in toto pursuant to O.15 r.5 RHC - Whether proper.

67 plaintiffs purchased units of houses from the defendant, developer in a housing scheme called Taman Bandar Baru. Being dissatisfied with the defective workmanship and materials used the plaintiffs filed a single suit claiming special damages of RM15,000 each. The defendant filed an application to strike out the claim pursuant to O. 15 r. 5 of the Rules of the High Court 1980 (RHC) which was dismissed in chambers. Upon further arguments the defendant contended that as each of the plaintiffs entered into a separate sale and purchase agreement referring to a different unit, they each had a separate cause of action which should not have been filed in a single writ.

Held:

[1] In the present case, the Court accepted that each plaintiff had a separate cause of action. However, in view of the nature of the relief, that is, that the writ and statement of claim be struck off *in toto*, the Court declined to make any determination as to whether separate writs should be filed. For the present application made pursuant to O. 15 r. 5(1) of the RHC, the proper prayer was to apply for an order that there be separate trials (or, depending on the situation, for such order as may be expedient). It was highly irregular to apply for an order that the writ and statement of claim be struck off *in toto*. Indeed the Court did not think that it had the power to do so under this particular order. Therefore the present application was misconceived.

[Order dismissing defendant's application confirmed].